

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

FCC - MAILROOM

**Petition for Declaratory Ruling that USA  
Datanet Corp. Is Liable for Originating  
Interstate Access Charges When It Uses  
Feature Group A Dialing To Originate Long  
Distance Calls**

WC Docket No. 05-276

**PETITION OF FRONTIER TELEPHONE OF ROCHESTER, INC.**  
**FOR DECLARATORY RULING**

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Date: November 22, 2005

## SUMMARY

Frontier Telephone of Rochester, Inc. ("Frontier"), an Incumbent Local Exchange Carrier, hereby petitions the Commission to declare that USA DataNet Corp. ("Datanet"), an interexchange carrier, owes Frontier originating access charges for Datanet's originating Feature Group A interstate long distance traffic that originates and terminates on the Public Switched Telephone Network ("PSTN"). Frontier's local customers make long distance calls over Datanet's network by dialing a local seven-digit number, obtaining second dial tone, and dialing the number of the called party on the PSTN.

Datanet claims that because it converts some of its traffic to and from Internet Protocol within its network, it is therefore providing an information service that is exempt from access charges. The Commission has previously disposed of this argument in WC Docket No. 02-361, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004).

Datanet further claims that because it obtains its Feature Group A seven-digit local access number from a Competitive Local Exchange Carrier, it is therefore not liable to pay Frontier any of Frontier's tariffed access charges for the portion of access service that Frontier provides. However, originating interstate Feature Group A long distance traffic that is jointly carried by two local exchange carriers on its way to the interexchange carrier is just as subject to meet point billing by the two local exchange carriers as is Feature Group D traffic. Accordingly, the Commission should rule that Datanet owes Frontier its tariffed charges for the specific elements of originating Feature Group A interstate access that Frontier provides.

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Petition for Declaratory Ruling that USA  
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Feature Group A Dialing To Originate Long  
Distance Calls

WC Docket No. 05-\_\_\_\_\_

**Petition of Frontier Telephone of Rochester, Inc. for Declaratory Ruling**

**Introduction and Factual Background**

This Petition arises from the refusal of a long distance carrier to pay originating access charges for a large volume of traffic, primarily on the ground that the provision of the phone-to-phone long distance calls in question is allegedly an "information service." The amount at issue, including late payment charges, exceeds \$1 million. The issues involved in this Petition are very similar to those involved in WC Docket No. 05-276. In that proceeding the Commission is considering petitions for declaratory ruling filed by the SBC incumbent local exchange carriers and VarTec Telecom, Inc. dealing with the applicability of access charges to calls in which Internet protocol is used.<sup>1</sup> Frontier Telephone of Rochester, Inc. ("Frontier") respectfully requests that the Commission establish a pleading cycle for comments and reply comments on this Petition and that the Commission consolidate this matter into WC Docket No. 05-276.

Frontier is the incumbent local exchange carrier ("ILEC") in the Rochester, New York area. USA Datanet Corp. ("Datanet") is an interexchange carrier providing long distance services to Frontier's and other local exchange carriers' end users. For reasons unknown to

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<sup>1</sup> WC Docket No. 05-276, Public Notice, *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, DA 05-2514 (released Sept. 26, 2005).

Frontier, Datanet chooses not to be a presubscribed carrier in the Rochester area, but instead chooses to require its customers to use Feature Group A dialing. In order to place a long distance call using Datanet, a customer must dial an ordinary seven-digit number, obtain second dial tone from Datanet's switch, input the customer's personal identification number ("PIN"),<sup>2</sup> and then dial the telephone number of the called party. Each call originates and terminates on the Public Switched Telephone Network ("PSTN"). Both the calling and called parties use ordinary CPE to make and receive the calls. The only service provided by Datanet with respect to these calls is the simple transmission of a voice long distance call.

Datanet does not obtain its Feature Group A service solely from Frontier. Instead, it obtains its seven-digit Feature Group A number from Paetec Communications, Inc., a competitive local exchange carrier ("CLEC") that operates in Rochester and exchanges traffic with Frontier pursuant to an interconnection agreement. Because Paetec provides part of the originating access service to Datanet, Frontier bills only that portion of the interstate access charge rate elements that apply to the portion of access service provided by Frontier. Because Paetec and Frontier have no arrangements for either carrier to bill access charges on behalf of the other, Frontier's billing of its access rate elements to Datanet comports with industry standards for meet-point billing of access charges, following the "multiple carrier, multiple bill" option.

Frontier carries each call from the originating Frontier end user in the Rochester, New York area over a normal dial tone line to the end office switch, which is either a Frontier remote switch or a Frontier host switch. If the call originates from a remote, Frontier carries it to the host. Frontier then carries the call from the Frontier host to Paetec's CLEC switch. Paetec then delivers the call to Datanet's switch and Datanet terminates the call to an end user on the PSTN

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<sup>2</sup> The PIN step is skipped if Datanet's switch recognizes the originating telephone number as a subscriber through the use of Caller ID technology.

located outside of New York State. The interstate access rate elements that Frontier bills to Datanet are:

1. End Office Common Trunk Port (applicable because Frontier provides local switching at the origination of each call);
2. End Office Local Switching (same as immediately above);
3. Local Transport Tandem Transmission – Fixed (applicable because Frontier delivers the traffic to Paetec; also applies where the call originates from a Frontier remote switch and must be carried to Frontier's host switch); and
4. Local Transport Tandem Transmission Facility (applies only when the call originates from a Frontier remote switch).

It is Frontier's understanding that Paetec does not actually bill its share of originating access charges to Datanet, but instead that the two carriers have some kind of contractual arrangement. This arrangement is irrelevant to the amount of access charges owing by Datanet to Frontier.

Datanet claims that it converts some of its calls to Internet Protocol ("IP") within its network for transmission. However, there is no net protocol conversion, and Frontier has discovered that Datanet routes some of its "overflow" originating traffic to one or more interexchange carriers with no protocol conversion whatsoever taking place on those calls. Nevertheless, Datanet used its alleged protocol conversion as a pretext to refuse to pay Frontier's originating access charges for any of its traffic.

When Frontier discovered that Datanet was originating Feature Group A calls from Frontier's end users, Frontier demanded payment of originating access charges.<sup>3</sup> Datanet refused to pay. Frontier filed a complaint regarding Datanet's refusal to pay originating intrastate access charges with the New York Public Service Commission. After vigorous

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<sup>3</sup> Datanet terminates its interstate long distance traffic to Frontier via other long distance carriers, and Frontier believes that the other carriers are paying the appropriate access charges to Frontier for Datanet's terminating traffic. This Petition therefore only deals with Datanet's originating interstate traffic.

litigation, the NYPSC sided with Frontier and directed Datanet to pay originating access charges to Frontier on Datanet's intrastate traffic. A copy of the NYPSC's May 31, 2002 order is attached as **Exhibit A**. Datanet is now paying Frontier its Feature Group A originating intrastate access charges.

Frontier commenced billing intrastate Feature Group A access charges to Datanet on or about June 1, 2001, and commenced billing interstate Feature Group A access charges to Datanet on or about April 1, 2003. However, notwithstanding the NYPSC order, Datanet refused to pay the interstate access charges billed by Frontier, raising the same tired argument that its phone-to-phone voice long distance service was an "information service."

On April 21, 2004, the Commission released its "IP-in-the-middle" decision in WC Docket No. 02-361, *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457 (2004) ("AT&T Order"). Datanet's service clearly falls within the definition of a "telecommunications service" rather than an "information service" under that decision because the calling and called parties use ordinary CPE with no enhanced functionality, the traffic originates and terminates on the PSTN, and the traffic undergoes no net protocol conversion and provides no enhanced functionality to end users.<sup>4</sup> Because the situation was so clear and because the FCC stated an expectation in the AT&T Order that "LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate",<sup>5</sup> Frontier filed an action to recover its unpaid interstate originating long distance access charges in the United States District Court for the Western District of New York. A copy of Frontier's February 10, 2005 complaint is attached hereto as **Exhibit B**.

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<sup>4</sup> AT&T Order, ¶1.

<sup>5</sup> AT&T Order, footnote 93 at ¶23.

In a last-ditch attempt to stave off the payment of the interstate access charges that it so clearly owes, Datanet filed a Motion to Dismiss, once again raising its tired and discredited IP argument. A copy of the Motion to Dismiss is attached hereto as **Exhibit C**. Notably, Datanet failed even to cite the AT&T Order, issued almost a year before. In oral argument Datanet's attorneys argued that footnote 58 of the AT&T Order limits the reach of that Order to services that use 1+ or Feature Group D dialing. Unable to resolve the issues to its satisfaction, the District Court referred the issue of the applicability of Frontier's access charges to the Commission on the basis of primary jurisdiction. A copy of the Court's order is attached hereto as **Exhibit D**.

Accordingly, pursuant to the Court's referral on the ground of primary jurisdiction, and pursuant to 47 C.F.R. §1.2, Frontier files this Petition for a declaratory ruling that Datanet, and any similarly situated carrier,<sup>6</sup> must pay Frontier its duly tariffed originating interstate access charges as billed by Frontier on a meet point billing basis, plus Frontier's duly tariffed late payment charges.

**I. Datanet's Use Of Feature Group A Dialing Does Not Distinguish Its Service From The AT&T "IP-in-the-Middle" Decision.**

The only distinction between Datanet's service and AT&T's service as set forth in the AT&T Order is that Datanet requires its customers to use a decades-old system of dialing, in particular, seven-digit Feature Group A dialing. This type of dialing was the only option available to competitive long distance carriers before the advent of equal access. Feature Group D 1+ equal access dialing is far more convenient to end users and provides a technically better quality of service than the line-side Feature Group A connection. A Feature Group A

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<sup>6</sup> Frontier is currently investigating another carrier that may be acting in the same manner as Datanet.

connection is more subject than Feature Group D service to echoing and other service quality issues. Datanet has never provided an explanation of why it does not interconnect with Frontier like every other long distance carrier. Frontier's access charges for Feature Group A and Feature Group D are the same. With equal access Feature Group D dialing, customers dial far fewer digits than they must dial to place a call with Datanet. The only reason that Frontier can surmise for Datanet's failure to use equal access is that it hoped, for as long as possible, first to hide its traffic from Frontier by using a CLEC to provide it with a seven-digit number, and then after Frontier's discovery of its use of Frontier's network, to stall as long as possible in paying the access charges that every other carrier must pay. As a result of its tactics, it has been able to offer its customers very low long distance rates, a clear case of unfair competition. To put it bluntly, Datanet is cheating and there is no basis to allow it to continue to cheat.

There is absolutely nothing in its use of Feature Group A dialing that turns Datanet's telecommunications service into an information service. Datanet's service is in fact less featured and more archaic than the AT&T Feature Group D service that was the subject of the AT&T Order. Datanet offers less to its customers than the plain old long distance service offered by AT&T, for which the Commission ruled that AT&T must pay access charges.

There is also absolutely nothing in its use of Paetec's seven-digit numbers that exempts Datanet from paying interstate access charges to Frontier. As the Commission stated in the AT&T Order, it is irrelevant whether multiple carriers are involved.<sup>7</sup>

Accordingly, because the facts of the AT&T Order are legally indistinguishable from the facts in this case, the Commission should issue a declaratory order that Datanet is responsible to pay Frontier's Feature Group A interstate access charges.

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<sup>7</sup> AT&T Order, ¶19. As directed by the Commission in footnote 92 at ¶23 of the AT&T order, Frontier is assessing its applicable access charges against Datanet, not against its intermediary CLEC Paetec.

**II. Datanet Is Obtaining Feature Group A  
Access Services From Frontier.**

In the Federal court case, Datanet made several specious arguments that Datanet is actually not obtaining Feature Group A service under Frontier's tariffs, and Frontier expects Datanet to renew its arguments in this proceeding. For example, Datanet argued in its Motion to Dismiss that Datanet is not liable because it did not order Feature Group A service from Frontier.<sup>8</sup> The problem with this argument is that it intentionally obtained and continues to use Feature Group A service from Frontier. Datanet further claims that it is "not interconnected in such a manner that it can expect to receive access services from Plaintiff, because USA Datanet does not interconnect directly with Plaintiff at all."<sup>9</sup> This argument does not stand up to the least degree of scrutiny. If it were correct, then no interexchange carrier making and receiving calls from a CLEC's customers through an ILEC's tandem would ever owe any access charges to the CLEC. If it were correct, there would be no such thing as meet point billing of jointly provided access by two LECs that are each involved in the provision of local exchange access to an interexchange carrier. The simple fact of the matter is that jointly provided switched access services are a common occurrence, and in every one of these occurrences the interexchange carrier is directly interconnected with only one of the joint providers.

Cynically, Datanet even claimed that it has taken "reasonable steps to prevent the receipt of access services" from Frontier, because it is interconnected with Paetec.<sup>10</sup> This assertion is utter nonsense. The majority of Datanet's originating long distance traffic comes from Frontier, because Frontier serves the majority of residential customers in Rochester. Datanet's services are aimed at residential customers who are willing to dial the extra digits

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<sup>8</sup> Motion to Dismiss (Exhibit C to this Petition), pp. 22-23.

<sup>9</sup> Motion to Dismiss, p. 23.

<sup>10</sup> *Id.*

required for Feature Group A dialing. As far as Frontier is aware, Paetec does not even have any residential customers, which means that Datanet gets the vast majority of its long distance traffic from customers served by LECs other than Paetec. Datanet's claim that it has attempted to avoid receiving access services from Frontier is false and is close to fraudulent. Datanet knew precisely what it was doing when it obtained a seven-digit number from Paetec and started advertising its long distance services in Rochester, including direct mail advertisements to Frontier end users.<sup>11</sup>

Datanet has also taken the position that it is entitled to use Frontier's services at no charge because its Feature Group A number was assigned by Paetec and not by Frontier. This assertion also fails to stand up to elementary scrutiny. It is equivalent to a statement that an interexchange carrier is responsible to pay only one carrier for access services even though it uses the services of multiple carriers to originate its traffic. It is as if AT&T were saying that it is entitled to originate its long distance traffic from every ILEC and CLEC in a tandem serving area without paying any carrier other than the tandem provider with which AT&T is directly connected.

The simple fact of the matter is that Feature Group A service is capable of being provided by multiple LECs, and is equally subject to meet point billing by multiple LECs as is Feature Group D service. The interexchange carrier is free to make its initial interconnection with any LEC of its choice as long as the traffic will flow. In this case Datanet is effectively using Paetec as a tandem, with Frontier providing elements of local switching and transport. The fact that Datanet only directly connects with Paetec and the fact that Datanet obtained its Feature

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<sup>11</sup> Frontier first identified Datanet's use of Frontier's network when Datanet sent one of its direct mail advertisements of its long distance services to Frontier's Director of Carrier Services, who was immediately aware that Datanet was not paying any access charges to Frontier.

Group A seven digit number from Paetec are relevant only to which access elements are billable by Frontier and which access elements are billable by Paetec.

In this situation, the local switching, common trunk port, and some transport rate elements are billable by Frontier, because Frontier supplies the local switch<sup>12</sup> that serves the end user who originates a long distance Datanet call, and because Frontier provides transport to the Paetec switch.<sup>13</sup> The physical progression of an originating Datanet call is from Frontier's end user to Frontier's local switch<sup>14</sup> to Paetec's switch<sup>15</sup> to Datanet's switch. Paetec is effectively providing tandem switching and entrance facilities, and Frontier does not bill for these rate elements. Frontier requests the Commission to find that the rate elements specified herein apply to the long distance traffic of Datanet and other interexchange carriers in its situation.

## Conclusion

For the reasons stated herein, the Commission should establish a pleading cycle for comments and reply comments on this Petition, consolidate this matter into WC Docket No. 05-276, and issue a declaratory ruling that Datanet and any similarly situated carriers are responsible to pay Frontier interstate Feature Group A access charge elements as stated

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<sup>12</sup> Frontier would also be entitled to bill Datanet a Carrier Common Line charge if Frontier's charge were other than zero.

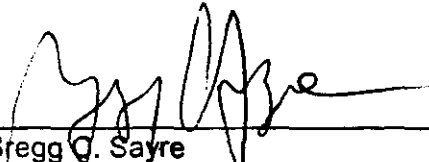
<sup>13</sup> In some cases, the call is switched by a tandem owned by Frontier. Frontier does not bill Tandem Switching for these cases because the Paetec switch acts as the access tandem and Frontier's switch acts as a subtending tandem for Datanet's traffic.

<sup>14</sup> This local switch may be a Frontier host or a Frontier remote switch. Frontier's tariffed End Office Common Trunk Port and End Office Local Switching rate elements apply to this portion of the service. Frontier's tariffed Local Transport Tandem Transmission – Fixed and Local Transport Tandem Transmission Facility rate elements also apply when Frontier transports a call from a Frontier remote to a Frontier host.

<sup>15</sup> Frontier's tariffed Local Transport Tandem Transmission – Fixed rate element applies to this portion of the service.

herein, together with Frontier's tariffed late payment charges.

Respectfully Submitted,

  
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Date: November 22, 2005

Attachments: Exhibit A - NYPSC's May 31, 2002 order

Exhibit B - Frontier's February 10, 2005 complaint

Exhibit C – Datnet's Motion to Dismiss

Exhibit D – District Court order referring issue of applicability of Frontier's access charges to the Commission

STATE OF NEW YORK  
PUBLIC SERVICE COMMISSION

At a session of the Public Service  
Commission held in the City of  
Albany on March 20, 2002

RECEIVED

COMMISSIONERS PRESENT:

JUN 5 2002

Thomas J. Dunleavy, Presiding  
James D. Bennett  
Leonard A. Weiss  
Neal N. Galvin

CASE 01-C-1119 - Complaint of Frontier Telephone of Rochester Against US DataNet Corporation Concerning Alleged Refusal to Pay Intrastate Carrier Access Charges.

ORDER REQUIRING PAYMENT OF  
INTRASTATE CARRIER ACCESS CHARGES

(Issued and Effective May 31, 2002)

BY THE COMMISSION:

INTRODUCTION

On August 13, 2001, Frontier Telephone of Rochester, Inc. (Frontier) filed a complaint against US DataNet Corporation (DataNet) stating that DataNet has refused to pay tariffed and properly assessed intrastate access charges. Frontier requests the Commission order DataNet to pay Frontier's applicable past and present intrastate access charges together with late payment charges.<sup>1</sup> Frontier further requests us to declare that in the event of continued nonpayment, Frontier may terminate service to DataNet's long distance access numbers following the procedures outlined in its tariff upon appropriate notice to DataNet, PaeTec Communications, Inc.<sup>2</sup> and the Commission.

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<sup>1</sup> FTR claims \$713,714.37 from August 1999 through May 2001.

<sup>2</sup> PaeTec Communications, Inc. is a competitive local exchange carrier providing switched dial tone and other services in Rochester and other areas. PaeTec is providing routing of DataNet's traffic.

In response to Frontier's complaint, DataNet explains that it provides long distance and other enhanced services to customers through what is commonly known as Internet protocol (IP) telephony,<sup>3</sup> and therefore, under Federal law, is not required to pay intrastate access charges such as those billed by Frontier. DataNet asks the Commission to dismiss this complaint on these grounds, and implies that if we adopt a contrary position, it would raise significant policy issues of national importance and, therefore, should be referred to the Federal - State Joint Board.

Also in its response, DataNet points out that Frontier waited two years to raise these issues, despite its full knowledge of DataNet's operations. DataNet claims that it relied on Frontier's silence over that entire period as assent that no access charges were due. DataNet acknowledges that if Frontier had notified them that Frontier would be claiming an entitlement to access charges, it would have considered reconfiguring its network or its connections to the local exchange network and subscribed to less-costly methods of access. DataNet argues that any findings now that access charges are due must be strictly limited to prospective applicability only. Finally, DataNet requests that if we find that intrastate access charges apply, we conduct an investigation of the validity of Frontier's existing intrastate access rates, and pending completion of such a review, direct Frontier to establish interim rates equivalent to its comparable interstate access charges.

The Small Company Group (SCG) representing 28 rural New York telephone companies also filed comments regarding this complaint. The SCG believes that the issues raised by DataNet's operations are not limited to Frontier but apply to any local exchange carrier (LEC) where that LEC provides access services in an area where DataNet operates. Hence, SCG

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<sup>3</sup> Internet Protocol (IP) telephony services enable real-time voice transmission using Internet protocols. The services can be provided in two basic ways: through software and hardware at the customer's premises or through "gateways" that enable applications originating and/or terminating on the public switched telephone network (PSTN). Gateways are computers that transform the circuit-switched voice signal into IP packets, and vice versa, and perform associated signalling, control, and address translation functions. The voice communication can be transmitted along with other data on the "public" Internet, or can be routed through PSTNs or through intranets or other private data networks. (In the Matter of Federal-State Joint Board on Universal Service, cc Docket No. 96-45, 13 FCC RD 11501, Release Number 98-67, released April 10, 1998, Para 84).

requests the Commission to establish a new proceeding to address the policies and rules that will govern the establishment of relationships between similarly situated LECs and companies such as DataNet.

DataNet opposes SCG's request, and submits that the proceeding sought by SCG is inappropriate and unnecessary, and in any event should not occur in this forum. DataNet reiterates in its comments that IP telephony, such as that provided by DataNet, is an information service subject to Federal jurisdiction, and under existing FCC rules is not subject to access charges. DataNet notes that all policies relating to the existing exemption will continue to be established by the FCC, and to the extent that SCG wishes a reversal of that current Federal policy, the appropriate forum in which to pursue that relief is the FCC.

Taconic Telephone Corp. (Taconic) also submitted comments in support of the complaint filed by Frontier. It requests that the Commission enforce the intrastate access provisions of Frontier's tariff and order DataNet and other similarly-situated companies to pay all outstanding access charges. DataNet did not respond to Taconic's comments.

#### PETITION

In its complaint, Frontier explains that its Tariff P.S.C. No. 3, at §6.2.1(A), §17.4.1 and §17.4.2 identifies a charge for Local Transport plus a further charge for Local Switching per intrastate minute of usage. These tariffs are applicable for originating access to long distance carriers whose customers reach the carriers by dialing 7-digit numbers provided by a LEC to the long distance carrier through the "line side" of the central office switch serving the long distance carrier. This type of access is defined as Feature Group A (FG-A) services. It is also possible for long distance carriers to use 7-digit numbers with "trunk-side" access from their serving LEC, in which case this type of access is defined as Feature Group B (FG-B). Frontier's access charges for FG-A and FG-B are identical. Frontier believes that the call routing of DataNet's customers and the multiple switching aspects of its network entitles Frontier to FG-A and/or FG-B intrastate access charges.

In June and July 2001, Frontier billed intrastate access charges to DataNet based on Frontier's count of actual minutes originating with Frontier's local exchange customers and terminating to DataNet's long distance access numbers. Normally Frontier would apply a

Percentage of Interstate Usage (PIU) factor<sup>4</sup> to DataNet's total minutes of use in order to determine the minutes applicable to intrastate access charges. However, Frontier claims that it had no means of determining whether a caller reaching DataNet's switch was making an interstate or an intrastate call, and DataNet would not supply Frontier with a PIU factor. Pursuant to Tariff P.S.C. No. 3, §2.3.10(A), when a long distance carrier uses FG-A or FG-B access, it is required to provide the PIU factor to Frontier. Frontier states that it had no means of directly measuring the PIU factor because the long distance number is not dialed until after the call leaves the Frontier network. Therefore, Frontier billed DataNet's total minutes at its tariffed intrastate access charge rate. Frontier notes that it is willing to apply a reasonable PIU on a retroactive basis if DataNet complies with Frontier's tariff by providing a reasonable PIU and by paying Frontier's applicable tariffed access charges.

DataNet, a Syracuse, New York based company, states that it provides service to customers in the Rochester local service territory as well as throughout New York, through what is commonly known as Internet protocol (IP) telephony. It claims that through its use of IP telephony, it is able to provide high quality inter-city service to the general public at a price significantly less than what is being demanded by the major long distance carriers. DataNet acknowledges that the efforts of Frontier and other LECs to demand access charges from providers of IP telephony such as DataNet are not new. However, DataNet believes that such efforts remain completely contrary to Federal policies and requirements and has refused to pay Frontier the intrastate access charges that Frontier has billed.

In order to resolve the various issues that Frontier presented in its complaint against DataNet, a clear description and discussion of DataNet's network configuration is necessary. According to Frontier's complaint and DataNet's response, the dialing pattern for customers in the Rochester service territory accessing DataNet's long distance service is as follows:

- (a) The customer dials a local Rochester number, which is DataNet's 7-digit long distance access number that is provided by PaeTec Communications, Inc., a CLEC operating in Rochester.

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<sup>4</sup> The amounts for Interstate and Intrastate access charges are very different in Frontier's tariffs. Absent other information, Frontier's petition assumed all applicable charges at the higher Intrastate rate. DataNet stated that it could provide the Commission with the Percent Interstate Usage (PIU) so that the proper amounts can be calculated.

- (b) If DataNet's Caller ID technology recognizes that the call is coming from a customer who has an account with them, the call is processed. Otherwise, the customer is prompted to enter an authorization code (also known as a Personal Identification Number - "PIN").
- (c) Once a caller is authorized, the customer gets an interactive response unit that prompts the customer (if all information is correct to this point) to dial the area code and telephone number of the party to be reached.

By means of this dialing scheme, DataNet's customers are able to make calls anywhere within New York and elsewhere within the United States and Canada.

DataNet's corresponding network configuration for a customer making a long distance voice call is described as:

- (a) The call goes over the local Frontier loop serving the customer placing the call.
- (b) It then goes to Frontier's local central office where the call is switched.
- (c) The switched call goes over Frontier's interoffice trunks to Frontier's tandem.
- (d) The call is switched by the tandem and routed over an intercarrier trunk to PaeTec's switch.
- (e) In the PaeTec switch, the call goes over local access facilities which are leased by DataNet from PaeTec and is delivered to DataNet's IP network.
- (f) DataNet takes the signal from PaeTec and converts it to IP for transmission over its system. At the terminating end, the protocol is converted back to a signal compatible with the public switched telephone network.
- (g) Approximately 40% of the time, DataNet's IP network does not serve the called party's general location, in which case, DataNet uses the facilities of inter-exchange carriers to complete its calls, and therefore, no protocol conversion is used or needed.

Frontier argues that based on the call routing and DataNet's network configuration, it is entitled to assess intrastate access charges to DataNet pursuant to its Local Switching and Local Transport tariffs in P.S.C. No. 3, §6.2.1(A), 17.4.1 and 17.4.2. It asserts that DataNet advertises that it "uses Voice-over Internet Protocol to route calls over our private network using Internet technology," which would indicate that it provides services as an Internet protocol telephony provider. However, Frontier believes that DataNet does not use the public Internet to route its calls -- it uses IP only within its own network, and both caller and called parties send and receive analog voice signals using ordinary telephones. Frontier further asserts

that DataNet bills its customers like a telecommunications carrier, including taxes and surcharges.

Frontier claims that DataNet's network configuration requires multiple switching and transport operations before an originating DataNet call from a customer in Frontier's local service territory leaves Frontier's network. Frontier acknowledges that DataNet could avoid the Local Transport rate charges by taking originating traffic at each of Frontier's host central offices through collocation arrangements. Frontier believes that since it switches and routes these calls, it is entitled to assess intrastate access charges on DataNet's traffic for both Local Switching and Local Transport, pursuant to Frontier's Tariff P.S.C. No. 3, §6.2.1(A), 17.4.1 and 17.4.2.

### DISCUSSION

In addressing Frontier's complaint, separate informal meetings were held with both parties, and we reviewed the FCC's views of Internet protocol telephony providers. Based on our analysis, the Commission concludes that DataNet is not providing enhanced information services, but rather telecommunication services for which access charges should apply.

The FCC made an extensive analysis of telecommunications services, enhanced services and IP telephony in particular. It stated:

"We recognize that new Internet-based services are emerging, and that our application of statutory terms must take into account such technological developments. We therefore examine in this section Internet-based services, known as IP Telephony, that most closely resemble traditional basic transmission offerings. The Commission to date has not formally considered the legal status of IP telephony. The record currently before us suggests that certain "phone-to-phone IP telephony" services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services." (In Matter of Federal-State Joint Board on Universal Service (cc Docket No. 96-45, 13 FCC RD 11501, Release Number 98-67, released April 10, 1998, Para. 83, citations omitted)

The FCC noted that the 1996 Telecommunications Act defined "telecommunications" to mean "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received," and defined "information service" to mean "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and [such term] includes electronic publishing, but does not

include any use of any such capability for the management, control or operation of the telecommunications system or the management of telecommunications service.” (Id. Para. 30)

Accordingly, the FCC concluded that an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers “telecommunications.” (Id. Para. 39). Continuing, the FCC noted that certain protocol processing services that result in no net protocol conversion to the end user are deemed telecommunications services (Id. Para. 50). “The protocol processing that takes place incident to phone-to-phone IP Telephony does not affect the service’s classification, under the Commission’s current approach because it results in no protocol conversion to the end user.” (Id. Para. 52, citations omitted).

The FCC stated that this functional approach is consistent with Congress’s direction that the classification of a provider should not depend on the type of facilities used. A telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, cable, satellite, or some other infrastructure. Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service (Id. Para. 59).

More specifically, the FCC defined “phone-to-phone” IP telephony as a service which: 1) holds itself out as providing voice telephony service; 2) does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call over the public switched telephone network; 3) allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and 4) transmits customer information without net change in form or content. (Id. Para. 88)

The FCC noted that when an IP telephony service provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over an “IP network.” These providers typically purchase dial-up or dedicated circuits from carriers and use those circuits to originate or terminate calls. From a functional standpoint, according to the FCC, users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. (Id. Para. 89).

Thus the FCC concluded that: "users of certain forms of phone-to-phone IP telephony appear to pay fees for the sole purpose of obtaining transmission of information without change in form or content. Indeed, from the end-user perspective, these types of phone-to-phone IP telephony service providers seem virtually identical to traditional circuit-switched carriers. The record currently before us [FCC] suggests that these services lack the characteristics that would render them "information services" within the meaning of the statute, and instead bear the characteristics of "telecommunications services." (Id. Para. 101, citations omitted).

Finally, specifically addressing the issue of access charges the FCC stated: "We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges." (Id. Para 91)

In the instant case, the Commission focused on an individual service offering. We reviewed all the submissions, the configuration of DataNet's system, the nature of the service provided, and the FCC decisions. Based on that review the Commission finds that:

- (a) DataNet holds itself out as providing voice telephony service.
- (b) It does not provide enhanced functionality to its customers, such as storing, processing or retrieving information.
- (c) Its customers are not required to use CPE different from the CPE used to place ordinary calls over the public switched telephone network.
- (d) Its customers place calls to telephone numbers assigned in accordance with the North American Numbering Plan.
- (e) Its use of Internet protocol is only incident to its own private network and does not result in any net protocol conversion to the end user.
- (f) A substantial portion of its traffic uses no IP conversion at all and is handled by interexchange carriers (IXCs).
- (g) It uses the same circuit-switched access as obtained by IXCs and imposes the same burdens on the local exchange as do IXCs.

Accordingly, we conclude that the service provided by DataNet is simple, transparent long distance telephone service, virtually identical to traditional circuit-switched

carriers. Its service fits the definition of "telecommunications" contained in the 1996 Telecommunications Act and is not "information service" or "enhanced service." Thus, its traffic is access traffic just like any other IXC's traffic. We also conclude that DataNet imposes the same burdens on the local exchange as do other interexchange carriers and should pay all applicable and appropriate charges paid by other long distance carriers, including access charges. In addition, we find that Frontier raised the issue of access charges in a timely manner, as soon as it discovered the nature of DataNet's service, and did not intentionally delay its request for payment.

Finally, we note that the issue here is a specific complaint concerning DataNet's service, and not a general policy discussion that might involve the Federal-State Joint Board as DataNet suggests. Further, we see no need for the initiation of a new proceeding as suggested by the SCG. Therefore, we will direct DataNet and Frontier to meet and discuss the access charges owed Frontier consistent with the determination in this proceeding. If they cannot agree on an amount and payment schedule, they may petition the Commission and/or seek the intervention of Staff.

### CONCLUSION

Based on our findings the Commission concludes that DataNet is liable for properly billed access charges for past and present service. The parties are directed to meet to attempt to work out an agreement on a reasonable payment schedule. Absent agreement the parties may seek further relief.

### The Commission orders:

1. To the extent consistent with the findings and conclusion of this Order, the requests of Frontier Telephone of Rochester, Inc. are granted and in all other respects are denied.
2. All other relief is denied.
3. This proceeding is continued.

By the Commission,

(SIGNED)

JANET HAND DEIXLER  
Secretary

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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FRONTIER TELEPHONE OF  
ROCHESTER, INC.,

COMPLAINT

Plaintiff,

v.

Civil Action No.:  
\_\_\_\_\_

USA DATANET CORP.,

Defendant.

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Plaintiffs, FRONTIER TELEPHONE OF ROCHESTER, INC. ("Frontier"), by its counsel, Wolford & Leclair LLP, for its complaint against the defendant USA DATANET CORP. ("USA DataNet"), alleges as follows:

**INTRODUCTION**

1. This action involves defendant USA DataNet's failure to pay Frontier for interstate originating switched access telecommunications service provided by Frontier to USA DataNet to allow USA DataNet to originate its telecommunications customers' calls over Frontier's network.

**PARTIES**

2. Plaintiff, Frontier Telephone of Rochester, Inc., is a New York Corporation with its principal offices and place of business located at 180 South Clinton Avenue, Rochester, County of Monroe, New York.

3. Upon information and belief, defendant USA DataNet is a Delaware corporation with its principal offices and place of business at 318 South Clinton Street, Syracuse, County of Onondaga, New York.

### **JURISDICTION**

4. This Court has subject matter jurisdiction over this case pursuant to 28 U.S.C. §1331, as the action arises under Federal Communications Act of 1934, 47 U.S.C. §§151 *et seq.*, and plaintiff Frontier's tariff filed with the Federal Communications Commission in accordance with 47 U.S.C. §203.

### **VENUE**

5. Venue is proper pursuant to 28 U.S.C. §1391(b)(2).

### **FACTS**

6. Plaintiff Frontier provides interstate and intrastate exchange access service, as well as telephone services in the United States.

7. At all relevant times, USA DataNet both provided and subscribed to telecommunications services in this judicial district.

8. All parties to this suit are telecommunications common carriers, subject to the provisions of the Communications Act of 1934, as amended, 47 U.S.C. §§151 *et seq.* (the "Communications Act"), and subject to the jurisdiction of the Federal Communications Commission ("FCC") and state public service commissions ("PSCs").

9. Plaintiff Frontier is known in the telecommunications industry as an Incumbent Local Exchange Carrier ("ILEC").

10. USA DataNet offers long-distance telephone service enabling its customer in one locality to call another person in a distant location. Because this

long-distance service involves connecting a caller in one local telephone exchange area with a receiving caller in another local telephone exchange area, the service USA DataNet provides is known in the telecommunications industry as "interexchange service."

11. USA DataNet is considered an "Interexchange carrier" or "IXC".

12. In general, USA DataNet's network does not extend the so-called "last mile" to an end-user customer's home or business. Instead, Local Exchange Carriers ("LECs"), including plaintiff, own, lease and/or resell extensive local telephone networks that extend the last mile to reach the end-user customers.

13. Competitive Local Exchange Carriers ("CLECs") are companies that began providing telephone service to consumers after the United States Congress passed the Telecommunications Act of 1996. 47 U.S.C. §153 *et seq.* CLECs compete with ILECs for the provision of telephone services.

14. ILECs and CLECs are collectively known as Local Exchange Carriers ("LECs").

15. Plaintiff is one of several ILECs, in addition to CLECs, that provide the connection between local and long-distance networks for USA DataNet.

16. In providing the connection between local and long-distance networks, plaintiff provides USA DataNet with "switched access service" for which USA DataNet pays switched access charges.